UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROGENE J. PAYNE ,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
AT-0752-95-0860-A-1

DATE: June 29, 1998

Roscoe E. Long, Esquire, Dunedin, Florida, for the appellant.

Otis Maclin, Jr., Memphis, Tennessee, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a dissenting opinion.

OPINION AND ORDER

The appellant timely petitions for review of an addendum initial decision that denied her motion for attorney fees. For the reasons set forth below, we GRANT the appellant's petition for review, REVERSE the initial decision's finding that fees are not warranted in the interest of justice, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

The agency demoted the appellant from an EAS-11 Human Resources Associate to a PS-5 Part-time Flexible Distribution Clerk based on a charge of improper conduct. *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 648 (1996). The charge related to the appellant's failure to review an employment application

that listed a criminal conviction. *Id*.; Initial Appeal File (IAF), Tab 3. On appeal, the administrative judge (AJ) affirmed the agency's action. *See Payne*, 72 M.S.P.R. at 648-49. On review, the Board agreed that the agency had proven its charge, but a majority of the Board mitigated the demotion to a thirty-day suspension, finding that it was the maximum reasonable penalty. *Id*. at 649-53.

The appellant filed a timely motion for attorney fees. Addendum Appeal File (AAF), Tab 1. The agency responded in opposition to the motion, and the appellant filed a reply to the agency's response. AAF, Tabs 3 and 4. The AJ found that an attorney-client relationship existed, that the appellant was the prevailing party, and that the appellant incurred attorney fees. The AJ denied the motion for fees, however, upon finding that the appellant did not show that attorney fees were warranted in the interest of justice. The AJ did not address the reasonableness of the amount of fees requested.

On review, the appellant argues that attorney fees are warranted in the interest of justice because, among other things, the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.[*] The agency opposes the petition for review.

ANALYSIS

The appellant asserted below that attorney fees were warranted in the interest of justice because, among other things, the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. AAF, Tabs 1 and 4. The AJ did not identify and address this issue in her initial decision. This was error. *See Spithaler v. Office of Personnel Management*, 1

[*] Because, as set forth below, we find that attorney fees are warranted in the interest of justice under category five of *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 435 (1980), i.e., the agency knew or should have known that it would not prevail, we need not address the appellant's contention that an award of fees is warranted based on any other *Allen* categories.

M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests).

The Board has held that attorney fees are warranted in the interest of justice when the agency knew or should have known that it would not prevail on the merits when it brought the action. *See Allen*, 2 M.S.P.R. at 435. It has also held that the "merits" of a decision include the selection of penalty for purposes of the "knew or should have known" attorney fee category; fees will generally be warranted when all of the charges are sustained and yet the Board mitigates the penalty imposed, unless the Board's decision to mitigate is based upon evidence that was not presented before the agency. *See Lambert v. Department of the Air Force*, 34 M.S.P.R. 501, 507 (1987); *see also, e.g., Crawford v. Department of the Treasury*, 60 M.S.P.R. 614, 619 (1994); *Caryl v. Department of the Treasury*, 57 M.S.P.R. 76, 78-80 (1993).

Here, there is no dispute that the sole agency charge was sustained, and that the Board mitigated the penalty imposed. We further find that our decision to mitigate was based upon evidence that was presented before the agency.

In mitigating the appellant's demotion to a thirty-day suspension, we relied on the appellant's twenty years of service with no prior disciplinary record and the fact that this was a single lapse in performance by an employee who consistently received very good performance evaluations as a personnel assistant. *Payne*, 72 M.S.P.R. at 651. This evidence was clearly before the agency when it took the demotion action because the deciding official considered the appellant's work history, lack of prior disciplinary actions, and years of service. *See* IAF, Tab 6, Subtab 4B. We also relied on the fact that this was an isolated incident, unintentional, and not committed for gain. *Id*. These factors were also before the agency. The appellant and her representative asserted in their replies to the notice

of proposed removal that the appellant is and always has been loyal to the agency, that her actions were unintentional, and that she did not know the applicant for employment, Susan Shaler, and did not act for personal gain. IAF, Tab 6, Subtab 4C at 2, and Subtab D at 3.

We also found that, based on the hearing testimony of the appellant and her supervisors, the appellant was not on clear notice of her duty to review Shaler's employment application, the hiring of Shaler as a transitional employee without Shaler having first been appointed as a casual employee was "out of the ordinary" and "not a routine task," and an EAS-22 manager vouched for Shaler as a good employee and waived review of Shaler's Official Personnel Folder. *Payne*, 72 M.S.P.R. at 651-52. The appellant raised these circumstances surrounding her offense in her reply to the notice of proposed removal. IAF, Tab 6, Subtab 4C ("I had no knowledge of the application of employment suitability self-instructional module ..., [and] when I asked [my supervisor] about this, she said it was training that her and Kathy Miller went to and she had not given me a copy as I did not do direct hiring"; "[p]rior to Susan Shaler's appointment, I had not processed any transitional employees other than converting current casuals"; "[a]s a level 11 Human Resources Associate, I was mandated by a level 22 MDO who had full authority . to bring Susan in as a TE"); *see* IAF, Tab 6, Subtab 4D (reply of the appellant's representative to the proposal notice).

We further relied on the appellant's substantial knowledge of a variety of personnel functions based on her fourteen years of personnel experience, and the testimony of the appellant's supervisor that, since the appellant's demotion, the personnel office had difficulty accomplishing its tasks because the employees who were detailed to the office had no background in personnel work. *Payne*, 72 M.S.P.R. at 652-53. The agency was aware of the appellant's knowledge of personnel functions from her PS Form 991 (Applicant Information), which was introduced into the record by the agency and which set forth her training and

Postal Service experience. IAF, Tab 6, Subtab 4NN. The effect of the action on the efficiency of the personnel office should have been foreseen by the agency.

The AJ correctly cited *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308, 1313 (Fed. Cir. 1996), for the principle that mitigation of a penalty alone does not create a presumption that attorney fees are warranted in the interest of justice. The court did not, however, overrule our decision in *Lambert*. *Id*. A proper analysis under *Lambert* neither applies a per se rule nor fails to apply the attorney-fee statute correctly. *See Caryl*, 57 M.S.P.R. at 79.

The appellant did not argue that the Board's mitigation of the penalty alone either warranted an award of fees in the interest of justice or justified a presumption along those lines. Rather, she argued that based on the evidence before it, the agency knew or should have known that it would not prevail on the merits with respect to the penalty when it took the action. We agree.

Here, as detailed above, no new information was introduced at the hearing that was unavailable to the agency before it demoted the appellant. *See Crawford*, 60 M.S.P.R. at 619; *Lambert*, 34 M.S.P.R. at 507. Moreover, we find that the agency did not properly weigh the relevant factors for determining a penalty set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), and made its original judgment negligently or in disregard of relevant facts. *See Dunn*, 98 F.3d at 1313; *Payne*, 72 M.S.P.R. at 650-53. We therefore conclude that the agency knew or should have known that it would not prevail on the merits when it brought the action, and that attorney fees are warranted in the interest of justice.

ORDER

The initial decision's finding that attorney fees are not warranted in the interest of justice is REVERSED. We REMAND this appeal for adjudication of the reasonableness of the amount of fees requested. *Quintanilla v. Department of the Navy*, 59 M.S.P.R. 547, 551 (1993) (the AJ who decides an appeal is in the best position to evaluate the documentation submitted by counsel to determine

whether the amount of fees requested is reasonable). The AJ shall issue a new addendum initial decision consistent with this Opinion and Order.

FOR THE BOARD:
Washington, D.C.

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Robert E. Taylor
Clerk of the Board

* Because, as set forth below, we find that attorney fees are warranted in the interest of justice under category five of *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 435 (1980), i.e., the agency knew or should have known that it would not prevail, we need not address the appellant's contention that an award of fees is warranted based on any other *Allen* categories.

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Dissenting opinion of Vice Chair Beth S. Slavet

in

ROGENE J. PAYNE V. U.S. POSTAL SERVICE,
MSPB DOCKET NO. AT-0752-95-0860-A-1

I disagree with the majority's conclusion that attorney fees are warranted in the interest of justice. For the reasons given below, I would deny the appellant's petition for review because she has not shown that the agency knew or should have known that it would not prevail on the merits.

The agency issued a notice of proposed removal in this appeal alleging that the appellant, a human resources associate, approved an application for reinstatement without reviewing it. After the appellant responded, the agency reduced the penalty to a demotion to the position of distribution clerk. The agency stated that, applying the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), removal is the normal penalty, but the appellant's work history, lack of prior disciplinary actions, and years of service lead to a conclusion that she has potential for rehabilitation as a postal employee.

On appeal, the administrative judge, while finding that the agency did not prove all the specifications of the charge, nevertheless affirmed the action, finding that the appellant engaged in improper conduct by failing to review the application, and that the appellant was aware of her responsibility to review the application. The administrative judge considered the agency's mitigation of the penalty, independently reviewed the *Douglas* factors, and concluded that the demotion was warranted. The Board, Member Amador dissenting, further mitigated the penalty to a 30-day suspension. The Board found, contrary to the administrative judge, that the evidence indicates that the hiring situation was "out of the ordinary," that the appellant was not clearly on notice that she had the responsibility to perform the review, and that the one-time failure to perform the duty does not negate her overall ability to perform her job at a satisfactory level.

The only possible basis for awarding fees in this case is that the agency knew or should have known that it would not prevail. The majority cites *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308, 1313 (Fed. Cir. 1996), an arbitration case, for the principle that mitigation of a penalty alone does not create a presumption that attorney fees are warranted in the interest of justice. The court indicates that the mere fact that the arbitrator (or the Board) disagrees with the agency's penalty does not justify an award of fees; there must be a showing that the agency made its judgment negligently or in disregard of relevant facts. *Id*. The majority reaches the conclusion that the agency made its "original judgment" (I assume the reference is to the revised decision - the original decision was to remove the appellant) negligently or in disregard of relevant facts, but does not provide a basis for that determination.

I believe that the majority is basically giving lip service to *Dunn*. The standard for awarding fees in this case is not clearly set forth, and the basis for the majority's conclusion is unclear. It appears to me that the Board simply disagreed with the agency's and the administrative judge's interpretation of the facts and found that the demotion penalty was too harsh under circumstances. Under the facts of this case, I do not believe that the Board is justified in finding that the agency should have known that it would not prevail on the merits.

I, therefore, respectfully dissent.

JUNE 29, 1998

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Beth S. Slavet, Vice Chair